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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-778

CLAUDE M. HERRIMAN, OTTO L. KEELER, JR., OTTO L. KEELER, JR., as Executor of the Estate of OTTO L. KEELER, SR., and ALBERT W. COLLIER,
Petitioners,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the District Court for the Northern District of Indiana, from which the appeal now before this Court was taken, appears as an appendix to this brief.

QUESTION PRESENTED

The question presented for review is whether the District Court abused its discretion in denying a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside its earlier order dismissing the claims of certain class

members with prejudice for failing to comply with the court's orders for pretrial discovery in this case where

(1) the information sought was reasonable, relevant and necessary to the defense in preparing for trial, and

(2) the class members were fully and fairly notified and advised of the information required and of the consequences of failing to supply it.

STATEMENT OF THE CASE

The petitioners are four persons who were members of the plaintiff class in *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F.Supp 673 (N.D. Ind. 1966); 286 F.Supp. 702 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1122 (1970) (the "original action"). The original action charged that Midwestern United Life Insurance Company ("Midwestern") had violated Section 10(b) of the Securities Exchange Act of 1934 by aiding and abetting the fraudulent activities of Dobich Securities Corporation ("Dobich"), a securities dealer. Dobich's practice was to accept orders and payment for stock in various companies, including Midwestern, when Dobich did not own the stock. Purchase of the stock by Dobich and delivery to his customers would occur only after long periods of delay during which Dobich used the money for speculations. These proved to be disastrous. The action was brought on behalf of a class consisting of all persons who had paid Dobich for the purchase of stock in Midwestern which Dobich failed to deliver. The basis of the complaint in the original action was that Midwestern knew, or should have known from information available to it, that Dobich was engaging in fraudulent

practices, and that Midwestern failed to report such practices to the Securities Commissioner in order to derive benefits from a higher market price for its stock which resulted from Dobich's activities (App. 34).[1]

Promptly after the District Court determined that an action could be maintained under Section 10(b) for failure to report fraudulent activities to the Securities Commissioner and that the case should proceed as a class action (259 F.Supp. 673), the names and addresses of the class members were obtained from the Dobich records, and notices of the pendency of the original action were mailed to all members of the class, including the petitioners, on October 12, 1966 (App. 39-41). The notices described the nature of the case and informed the class members that they could elect to be excluded from the action by returning an enclosed form, or remain in the class and be represented either by counsel for the class or by an attorney of their own choosing. There were approximately 600 persons who had purchased shares in Midwestern from Dobich but did not receive delivery (App. 128). Of these, approximately 535, including the petitioners, became class members (App. 123) under the provisions of Rule 23.

On December 21, 1966, Midwestern filed a motion for production of certain documents and a set of 13 interrogatories to be submitted to each member of the plaintiff class (App. 42-46). *The interrogatories and motion for production sought information relevant and necessary in preparing to defend against liability to the class.*[2]

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[1] References denoted "App." are to the Appendix filed on the appeal of this case to the Circuit Court of Appeals, Cause No. 18682, which Appendix has been certified to this Court.

[2] One matter of defense was to persuade the District Court that the information which Midwestern had concerning Dobich's slow deliveries could not reasonably be expected to have put Midwestern on notice of the fraudulent nature of Dobich's activities and cause it to report them to

At the first pretrial conference, on December 22, 1966, the court granted the motion for production and ordered that the documents be produced on March 1, 1967 (App. 49-50). It discussed the interrogatories and, after considering various objections to their form and means for facilitating the answers (App. 124-27), ordered counsel for Midwestern and for the class to put the interrogatories in suitable form for submission to the members of the class (App. 53). This was accomplished by January 12, 1967 (App. 54), and there were mailed to each member of the class, including the petitioners: (1) the interrogatories, in multiple choice form or with space for writing in the answers immediately following each question (App. 55-65); (2) the court's order for production of documents (App. 49); (3) an order extending the time for entering appearances by counsel to March 1, 1967 (App. 51-52); and (4) a memorandum (App. 86-90) prepared by counsel for the class explaining in detail the discovery proceedings, the re-

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the Securities Commissioner. In preparing that portion of its defense, Midwestern sought to show by the answers to the interrogatories that many persons, some of whom were knowledgeable in financial and securities matters (App. 56-58), knew that Dobich was extremely slow in delivering stock but did not themselves notify the authorities (App. 59). Another important line of defense was causation. It was the plaintiff's theory that if Midwestern had reported what it knew about Dobich's late deliveries to the Securities Commissioner he would promply have stopped Dobich's fraudulent activities. Midwestern contended—and sought to prove in part through the answers to the interrogatories (App. 59)—that numerous purchasers from Dobich had made complaints to the Securities Commissioner (complaints of which on deposition the Commissioner had no recollection) and had communicated to him more information than was available to Midwestern, and that there was nothing which Midwestern could report to him that he did not already know from communications from class members. A third important subject of the interrogatories was to discover any communication to a Midwestern employee concerning Dobich or his activities about which Midwestern (and its attorneys) did not know and which might be the occasion for surprise at the trial if not discovered (App. 59, 63). The interrogatories were directed to discovering matters essential to the preparation of the defense against liability and to an appraisal of the exposure.

sponsibilities of the class members with respect to these proceedings, and the handling of the interrogatories and documents to be produced.[3]

Most of the class members responded. Some, including the petitioners, did not. A long series of letters, notices and a show-cause order was sent to each of the class members who had not responded to the interrogatories. These communications were typewritten and reproduced in easily readable form. They explained in the simplest terms what was required and what the consequences would be for failing to respond.[4] The series of communications and

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[3] The memorandum explained the interrogatories and said in part (App. 89):

> "We are enclosing a self-addressed envelope, for your convenience in returning to us a signed copy of the Interrogatories, and the various documents that have been requested by the other side. If you have employed a lawyer to act on your individual behalf, I am certain he will help you review the materials and answers required. If you have not employed independent counsel, do not hesitate to telephone Sidney Mishkin, of our office, for any help you may require in connection with these Interrogatories."

[4] On February 20, 1967, counsel for the class sent a letter (App. 92) to all class members who had not responded to the interrogatories or the court's order for production reminding them of the March 1 deadline. On May 4, 1967, counsel for the class again wrote to those who still had not responded, imploring them to answer. The letter said in part (App. 93-94):

> "* * * Obviously, we cannot predict the outcome of this case. If, however, you permit your claim to be dismissed, and we ultimately recover damages from Midwestern United Life, you would not be permitted to share in the recovery.
>
> "* * *
>
> "* * * Thus far, the Court has sustained our legal theory. Let your family lawyer read the decision of Judge Eschbach as reported in 259 Federal Supplement 673 (1966). We need your cooperation, however, if we are to recover any moneys on your behalf.
>
> "Please send us your answers to the Interrogatories and the documents subject to production by June 1, 1967.
>
> "If you no longer have the Interrogatories or the Order for Production of Documents which we sent you on January 12, 1967, let us know immediately so that we can provide you with these documents."

warnings of dismissal with prejudice persuaded most of the delinquent class members to answer (App. 132-33) and resulted in much relevant information which was introduced into evidence at the trial. It did not, however, persuade the petitioners.

On August 9, 1967, Midwestern filed its motion (App. 68-69) to dismiss with prejudice the claims of those class members, including the petitioners, who had failed to make any response to any of the discovery orders. The motion was granted (App. 70-71), and those affected, including the petitioners, were promptly notified (App. 85, 135).

Trial of the original action took place in January, 1968, and resulted in a judgment in favor of the class on June 26, 1968. The District Court's decision was appealed and

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The extended deadline of June 1 passed and the court entered its order (App. 95-96) directing the unresponsive members of the class, including the petitioners, to show cause on or before July 14, 1967, why the action as to them should not be dismissed with prejudice for failure to respond to Midwestern's interrogatories.

On June 9, 1967, counsel for the class transmitted (App. 85) copies of the show-cause order to the unresponsive members of the class, accompanied by a letter (App. 96-97) again warning those persons of the consequences of their inaction and attempting to persuade them to respond. That letter said in part (App. 96-97):

> "The simple way to show such cause and to avoid dismissal with prejudice is to answer the Interrogatories. If you do not answer the Interrogatories on or before July 14, 1967, your claim will be dismissed with prejudice by the Court.
>
> "There are approximately 535 persons in the class. Approximately 493 have answered Defendant's Interrogatories, and will participate in the case. Persons who do not answer the Interrogatories and show cause will not be permitted to remain in the class.
>
> "Obviously you are not required to participate in the case if you have no desire to do so. Equally obviously, we cannot guarantee a successful outcome. On the other hand, if we are successful in making recovery on behalf of Mrs. Brennan and the other class members who lost heavily in this situation, we would hate for you to lose your share of the recovery merely because you have failed to answer the Interrogatories in accordance with Federal Court procedure."

affirmed by the Seventh Circuit on September 29, 1969. On March 11, 1970, more than *two and one-half years* after the petitioners were notified of the dismissal of their claims with prejudice, they filed their Rule 60(b) motion to set the order of dismissal aside.

After due notice, a hearing on the Rule 60(b) motion was held June 12, 1970. At the hearing no evidence was introduced that the petitioners did not receive the notices, orders, communications and entreaties which were mailed to them. There was no evidence that they did not read and fully understand each of them. There was no evidence that the interrogatories were unduly burdensome to the petitioners. There was no evidence that they did not make a considered choice in refusing to respond or participate further in the action. There was no evidence of any action or effort which could have been taken, but was not, that would have caused the petitioners to respond.

The District Court found that the information sought by the discovery was "highly relevant" and that, contrary to the petitioners' assertion, there was "nothing in the record or before this court to suggest that defendants had a 'scheme' to make 'improper use of discovery procedures' and thereby deprive" petitioners of their day in court (App. 112). The District Court denied the motion, and the Court of Appeals for the Seventh Circuit affirmed. The majority opinion stated that normally in reviewing a lower court's denial of a motion under Rule 60(b), it was not the function of the Court of Appeals to determine whether the judgment from which relief is sought was substantively correct, but that it had nevertheless done so in this case and had given full consideration to the merits of the petitioners' arguments. It held that party discovery procedures with respect to class members were properly em-

ployed in this case where (1) the information sought was reasonable, relevant and necessary to the defense in preparing for trial, and (2) the class members were fully and fairly notified and advised of the information required and of the consequences of failing to supply it.

REASONS WHY THE WRIT SHOULD BE DENIED

The majority opinion of the court below states what must be the law if the facts required for a proper presentation of a class action such as this are to be known or knowable. A feasible method of enforcing necessary discovery from class members, properly supervised as the opinion below provides, is essential to adequate trial preparation in a case such as this. The petitioners' sweeping assertion that the decision may sound the death knell for Rule 23 class actions because it encourages broad motions to produce and extensive and burdensome interrogatories ignores not only the trial court's broad powers under Rule 26(c) to guard against oppression from over-zealous discovery, it also ignores the facts in this case and what the decision below held. The majority summarized its decision as follows:

> "In summary, we hold that absent members of a class who receive notice of the pendency of the class suit may be subjected to the party discovery procedures permitted under the Federal Rules. Before ordering such discovery, a trial court must be assured that the requested information is actually needed in preparation for trial and that discovery devices are not used to take unfair advantages of 'absent' class members. Moreover, adequate notice must be given so that such persons are fully informed of the discovery order and the possible consequences of their noncompliance with it. In this case both requirements were observed." (Pet. A13)[5]

[5] References denoted "Pet." are to the Petition for Certiorari.

The court did not hold that discovery is appropriate in every class action or that dismissal with prejudice is the only proper remedy for the failure of class members to respond when discovery is needed. It held that discovery and dismissal was proper in *this* case, where it was highly probable that class members had essential information going to the merits of the litigation, where they had abundant notice and explanation of what was required and how to respond, and where the smallest claims amounted to hundreds of dollars and most were in the thousands of dollars.[6] The guidelines prescribed by the court are explicit and reasonable. While protective of class members, the decision leaves a measure of discretion with the trial court to enforce discovery where actually needed in preparation for trial, as it was in this case. The decision in no way conflicts with the decision of any other Circuit, or any decision of this Court, or any concept of fairness or due process.

The Discovery Procedures Followed Were Wholly Proper

Contrary to the petitioners' charge that burdensome interrogatories were used to reduce the size of the class in this case (Pet. 2, 3), not one independent person—nor Judge Stevens, who wrote the dissenting opinion in the Court of Appeals—has suggested that Midwestern's discovery was improper, unnecessary, irrelevant, or burdensome, or should have been curtailed in any respect, or that it was used for any improper purpose. The District Court approved the discovery at the time it was ordered and confirmed that ruling in disposing of the petitioners' Rule 60 (b) motion. It found

> "Contrary to movants' assertion, there is nothing in the record or before this court to suggest that

[6] The claims of the four petitioners, for example, aggregated $70,000 (App. 138).

defendants had a 'scheme' to make 'improper use of discovery procedures' and thereby 'deprive claimants [movants] of their day in court.' As noted above, the interrogatories and documents sought to be produced were highly relevant to *both* plaintiff's and defendant's cases. Lead counsel for plaintiff, an experienced and highly competent lawyer, believed that defendant was entitled to obtain information concerning the contacts between class members and Dobich and was himself desirous of obtaining such information. In fact, as lead counsel states: 'Our [plaintiff's] case was benefited immeasurably from information obtained through these [defendant's] discovery efforts.' Movants' further assertion that the information sought to be elicited by defendant's discovery was 'either known at the time or was not material' is patently incorrect." (App. 12)

The Court of Appeals confirmed that assessment. It said

> "The record shows that the district judge had valid reasons from the standpoint of preparing the case for trial for ordering the discovery in this case. The requests were not designed solely to determine the identity and amount of the class members' claims, but were also directed at obtaining information relating to certain defenses raised by Midwestern in the principal trial. Counsel for the named plaintiff admitted that the information sought by Midwestern was relevant to its claim that it was not liable to the class. Moreover, movants impliedly concede that the discovery was proper by their argument that Midwestern could have proceeded with its pretrial discovery under Rules 30 and 31, FED. R. CIV. P., to which the sanctions of Rule 45, FED. R. CIV. P., are applicable. Finally, there is nothing in the record to suggest that the discovery procedures were used as a tactic to take undue advantage of the class members or as a strategem to reduce the number of claimants." (Pet. A10-11)

At the hearing on their Rule 60(b) motion, the petitioners had an opportunity to show in what way the interrogatories were burdensome, or that they did not understand the clear, straightforward communications of counsel for the class, or that they were somehow lulled into inaction. They claimed none of these things. Their sole objection reduces to an argument that party discovery procedures, as distinguished from witness discovery procedures, cannot be permitted in class actions. The argument disregards Rule 23 and is erroneous.

The petitioners received notices of the pendency of the class action, which spelled out to them their right to exclude themselves from the class. The notice even included a form for ease of doing so. The petitioners chose not to exercise that option, and thus became members of the class. Thereafter they were subject to the court's orders, the same as any other claimant. There is no basis whatsoever for the conclusion that a court which had jurisdiction to enter a res judicata judgment for or against the petitioners, and which had full power "to determine the course of proceedings" (Rule 23(d)(1)), did not have authority to enforce proper discovery through the sanction of dismissal.

The petitioners contend that they should have been given the right to exclude themselves in lieu of responding to discovery. The obvious answer to this contention is that they expressed no such desire—to the court, to their counsel, or to anyone else. Moreover, the argument that the petitioners should have been given the right to exclude themselves in lieu of responding to discovery totally ignores the reason for having the sanction of dismissal available in discovery proceedings. That reason is, in fairness, to enable the party against whom the action is brought to force those in whose behalf the action is brought to disclose facts and matters which may tend to support the defense,

or shed additional light on the claim, and thereby provide for a proper adjudication of the case.

Without the sanction of dismissal in class actions such as this, there would be a very grave practical limitation upon discovery. A later, permissive exclusion from the class, as urged by the petitioners, is not a sanction. Nor does it have any efficacy. It would not relieve the claimant of the ultimate requirement to disclose the facts if his claim were to be realized, and it would not provide a feasible method of obtaining needed information. Such a privilege of "second round" exclusion would accomplish little, other than to keep pertinent facts hidden, while ultimately leaving those choosing to be so excluded with precisely the same election as the petitioners had in this case—to respond to proper discovery or forego their claims.[7]

The petitioners characterize the dismissal of their claims as "unduly harsh" (Pet. 6). Would it have been more appropriate for the court to insist upon witness, rather than party, discovery procedures and resort to the harsher sanction of contempt under Rule 45, instead of the thoroughly appropriate sanction of dismissal with prejudice under Rule 37, which is available where the disobeying party has a claim which can be dismissed? Would fining or jailing the petitioners have been more appropriate?

The petitioners complain that their "separate interests" were not represented in court (Pet. 9). But we are left to guess just what these "separate interests" were. The peti-

[7] In other cases, where the possibility of discovering important information is remote and the nature of the class and the claims may be quite different from those in this case, it might well be within the trial court's discretion to allow "second-round" exclusion, but it was certainly within the court's discretion to choose the more effective sanction of dismissal under the facts of this case. The threat of dismissal assisted in obtaining answers to interrogatories from approximately 164 class members who, up to that time, had not responded adequately or completely.

tioners had an opportunity at the hearing on their motion to explain what interest, if any, it was that they were protecting by not answering the interrogatories. They offered none. They state that their interest is recovery against Midwestern, but that is precisely the same interest as was possessed by the rest of the class in the original action. The petitioners had no "separate interest." They were practicing a new form of an old evil which the 1966 amendments to Rule 23 were intended to prevent—sideline sitting. It was only *after* they were dismissed, as a result of their own persistent refusal to heed the advice of counsel for the class or seek counsel of their own, that the interests of the petitioners became separate.

The petitioners had, and chose to ignore, far more process than was their due. At every step of the proceedings, from the original communication notifying them of the class action, through the entire stream of correspondence from the court and from counsel for the class setting out in detail their responsibilities and the possible result of their failure to fulfill those responsibilities, the petitioners received a measure of due process which in form and substance met the most rigid standards of fairness.[8]

The "problems" which the petitioners foresee as arising from this decision (Pet. 11) are totally unrelated to *the facts* of this case and to *what the court below held.* In short, they are imagined. If, as the decision of the Court of Appeals requires and as was done in this case, adequate notice

[8] As bearing upon the matter of fairness, it may be noted that the Court of Appeals in reviewing the decision of the District Court holding Midwestern liable to the class, described the original action as a "close case" 417 F.2d 150. The information which Midwestern obtained from the class members who complied with the discovery requests provided substantial assistance in the defense of the original action. It did not provide enough for Midwestern to prevail. What would have been gained from the class members who did not respond, and how it would have affected the outcome in the original action, cannot now be known.

is given so that class members are fully informed of the discovery order and the possible consequences of noncompliance with it, the risk of defaulting a class member who has not received the interrogatories is eliminated.[9] The number of interrogatories which may be filed in a given case and the degree of completeness required[10] are obviously discretionary matters for the trial court, which, the Court of Appeals declares, must assure itself that the requested information is needed in preparation for trial and that the discovery is not used to take unfair advantage of "absent" class members. The trial courts have ample power to assure themselves of these matters, and the District Court did so in this case.

District Court Decisions Are Not In Conflict

The petitioners' assertion that decisions of the district courts are in conflict with respect to discovery in class actions is unfounded. The petitioners have not cited one case in which the court has concluded that it was without authority to impose discovery responsibilities upon class members *where the need for, and reasonableness of, discovery has been shown.* The petitioners' cases, to the extent they are relevant at all, support the established and uniform practice that discovery matters in class actions, as in all actions, are within the sound discretion of the trial court.

In *State of Illinois* v. *Harper & Row Publishers, Inc.*, No. 67-C-1899 (N.D. Ill.) (Pet. A17-20), the court declined to require class members to answer interrogatories which

[9] It should be noted again that no such claim was made by these petitioners on behalf of themselves or of the "dismissed" class which they represent.

[10] No claim of a class member was dismissed because his response to discovery was incomplete or inadequate. Only the claims of those class members totally failing to respond were dismissed (App. 131).

it variously characterized as "multitudinous," "exhaustive" and "multifaceted" and "seek[ing] myriad minute details." Far from holding that under no circumstances would interrogatories to class members be proper, the court suggested to counsel that they direct interrogatories "to a limited number of class members selected randomly" (Pet. A20). In *Fischer* v. *Wolfinbarger,* CCH Fed. Sec. L. Rep. ¶ 93,235 (W.D. Ky. 1971), certain of the refused interrogatories repeated matters already covered in proofs of claim previously required by the court to be filed by 3,000 class members (at p. 91,454). In *Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,* CCH Trade Reg. Rep. ¶ 73,482 (S.D. N.Y. 1971), the court merely declined to require that proof of claims be filed prior to trial of the case, as it clearly had discretion to do.

Korn v. *Franchard Corp.,* 50 F.R.D. 57 (S.D. N.Y. 1970), involved only the question of pretrial proof of claim forms. Even there, however, the court expressly recognized (at p. 60) its authority in a proper case to require affirmative action by class members. In *Berman* v. *Narragansett Racing Ass'n,* 48 F.R.D. 333 (D. R.I. 1969), the court also declined to require proof of claim forms for the express reason that "unlike *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.,* 43 F.R.D. 452, at 459 (E.D. Pa. 1968) [where proof of claim forms were required] [it] will not now expedite or clarify this action." *Id.* at 338. These are not holdings that the court may not authorize discovery directed to members of the class when such discovery is necessary to an adequate preparation for trial.

What authority there is on the issue fully supports the existence of the trial court's right to authorize discovery from members of the class. In *State of Minnesota* v. *United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968), inter-

rogatories were authorized to "all members of the class," 44 F.R.D. at 582. In *Research Corp.* v. *Pfister Associated Growers, Inc.*, 301 F.Supp. 497 (N.D. Ill. 1969), a patent infringement action against defendants as a class, the court ordered that discovery was open to "both sides." 301 F.Supp. at 504. Discovery directed to class members was approved by the court in *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D. N.Y. 1966). *Cf.*, Moore, Fed. Prac. ¶ 23.55, pp. 23-1160-61.

While this may properly be referred to in the words of the Court of Appeals as a "paucity of recorded precedent," the very lack of reported cases in which discovery authorized against class members has been questioned demonstrates the capacity of the district courts to deal effectively with such matters. It also demonstrates the wisdom of the majority opinion below in recognizing the need of trial courts to have reasonable discretion in dealing with discovery in class actions.

CONCLUSION

The decisions below are based upon the facts of this case. They do not, as the petitioners' argument seems to suggest, adopt a new rule or statute. They decide a case—this case. The opinion of the Court of Appeals affirms the District Court's discretion to enforce discovery procedures in accordance with the reasonable requirements of the particular case before it. To the extent that the case involves a broad principle, it is simply that one sued in a class action has the right reasonably to discover from the class members facts needed for the defense of the lawsuit, and that class members who elect to participate in the suit have a duty to assist the administration of justice in at least a

minimal way by disclosing facts pertinent to the case. This is not the introduction of a novel concept in American jurisprudence and does not constitute any departure from fundamental fairness or due process. It is entirely consistent with the long-established federal policy that the ends of justice are best served by providing a practical means for discovery of all pertinent facts.

The decision of the Court of Appeals is reasonable, and it is right. The petitioners' request for a writ of certiorari raises no question that is unsettled or which needs deciding by this Court. It should be denied.

Respectfully Submitted,

ALBERT E. JENNER, JR.,
JOHN C. TUCKER,
135 So. LaSalle St.
Chicago, Ill., 60603

G. R. REDDING,
JOHN L. WOOLLING,
FRED E. SCHLEGEL,
810 Fletcher Trust Bldg.
Indianapolis, Ind. 46204

DAVID B. KELLER,
1313 Anthony Wayne Bank Bldg.
Ft. Wayne, Ind. 46802

Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

TORA C. BRENNAN,
Plaintiff,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Defendant.

FORT WAYNE CIVIL No. 1716

MEMORANDUM OF DECISION AND ORDER

This action is before the court upon a motion under Rule 60(b) (4) and (6), FED. R. CIV. P., to set aside a dismissal with prejudice entered on August 17, 1967 against those initial members of plaintiff's class who had failed to answer defendant's interrogatories or to comply with the court's show cause order of June 7, 1967. This motion was filed on March 11, 1970 by C. M. Harriman, Otto L. Keeler, Jr., Otto L. Keeler, Jr. as Executor for the Estate of Otto L. Keeler, Sr., and Albert W. Collier on behalf of themselves and all other initial members of plaintiff's class whose actions and claims were similarly dismissed by this court's order of August 17, 1967.

The named movants and those other initial members of plaintiff's class who were dismissed for failure to answer defendant's interrogatories on August 17, 1967 hereinafter will be referred to collectively as the "movants." The movants' names and addresses were contained on Exhibit A attached to defendant's Motion to Dismiss, filed on August 9, 1967. A copy of said Exhibit A is attached hereto as Appendix A.

Pursuant to an order of this court, counsel for the named movants informed all other movants (1) of the

nature of the named movants' Motion for Relief from Order of Dismissal, (2) of the date, time and place of the hearing upon the motion, (3) that they may, if they wish, enter an appearance through counsel of their own choosing, (4) that if they do not enter an appearance through counsel of their own choosing, the counsel for the named movants will represent their interests in this motion, and (5) that this court's ruling upon this motion, whether favorable or unfavorable, will be binding upon all initial members of plaintiff's class listed in Appendix A who were dismissed on August 17, 1967. Named movants' counsel mailed such notice to all other movants on May 15, 1970 by regular United States mail at the address which appears on Appendix A, as evidenced by an affidavit of mailing.

Hearing upon this motion was held before this court on June 12, 1970. The court has received and considered briefs.

The named movants contend that under Rule 60(b) (4) and (6), FED. R. CIV. P., this court should set aside the dismissal of movants' actions and claims against the defendant because that order (1) is void, (2) violates procedural due process, (3) is based upon failure to answer improperly propounded and served interrogatories, and (4) inequitably permits a wrongdoer to eliminate class members on preliminary procedural grounds. For the reasons discussed below, the court finds the movants' contentions to be totally without merit.

I. Factual Background

A. *Of the Action Generally*

This securities fraud action initially came before the court upon defendant's motion to dismiss for failure to state a cause of action and to dismiss the claim insofar as it was a class action. The complaint alleged that the defendant, an issuer of securities, had aided, abetted, and assisted, by its failure to report improper activities of a brokerage firm, Dobich Securities Corporation, the alleged violations, by said brokerage firm, of Section 10(b) of the Securities Exchange Act of 1934. This court held that the

complaint stated a cause of action and that the action could properly be maintained as a class action under Rule 23(b) (3). *Brennan v. Midwestern United Life Ins. Co.*, 259 F.Supp. 673 (N.D.Ind. 1966). A notice of pendency of the class action was mailed to all members of plaintiff's class on October 12, 1966. This notice contained all the information required by Rule 23(c) (2), including that final judgment entered in this case would include and would be binding upon all members of the class who did not request exclusion, whether or not the judgment was favorable to the plaintiff. Movants were notified and did not request to be excluded from the class.

As will be described below in detail, movants were dismissed from the action by order of this court on August 17, 1967. Subsequently, after a bench trial, this court found in favor of the plaintiff and the remaining members of her class. *Id.* 286 F.Supp. 702 (N.D.Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 90 S.Ct. 1122 (1970). The determination of the amount of recovery to which each member of plaintiff's class is individually entitled is currently before a special master.

It has already been determined that this action was a proper class action. *Id.* 259 F.Supp. at 683-84. With respect to the issues raised by this motion for relief from an order dismissing initial members of plaintiff's class, the applicable notice requirements of Rule 23(c) (2) were fulfilled, as described above, by the notice mailed to all members of the named movants' class.

B. *Background on Dismissal of Movants*

On December 19, 1966, defendant filed a motion for the production of documents by plaintiff and each member of her class. Defendant sought all correspondence, order forms, cancelled checks, memoranda, and similar communications between Dobich Securities Corporation and the members of plaintiff's class. Defendant contended that such documents and written communications were relevant to the action because they would tend to indicate the extent of knowledge of each class member concerning Dobich's

activities and the respective dates when such knowledge was acquired, as compared with the extent of defendant's knowledge of such activities. Such documents, defendant further contended, would also tend to indicate whether defendant's alleged failure to report Dobich's practices was a proximate cause of any alleged loss. Defendant finally contended that such information would tend to show whether each member of plaintiff's class exercised reasonable care to avoid the loss for which recovery was sought. On December 22, 1966, this court granted defendant's motion for production of these documents from the plaintiff and all members of her class.

At the first pre-trial conference on December 26, 1966, the matter of the interrogatories submitted by defendant were discussed. The interrogatories concerned the business experience of members of plaintiff's class and their stock purchase transactions over a period of years. As embodied in Paragraph 7 of the First Pre-trial Conference Order, entered January 4, 1967, attorneys for plaintiff and defendant were directed to put defendant's interrogatories in a form most suitable for submission to the class members.

On January 12, 1967, an explanatory memorandum was prepared by counsel for plaintiff, a copy of which is before the court, which described the nature and import of the proceedings in this action to that date. This memorandum, together with two copies of defendant's interrogatories, a copy of the order of production, and a copy of the First Pre-trial Conference Order were mailed by plaintiff's counsel to all creditors of Dobich Securities Corporation who were members of plaintiff's class and had not requested that they be excluded from the class action. The completion of this mailing to the class members, *including the movants*, was evidenced by an affidavit of plaintiff's counsel filed on January 24, 1967. The explanatory memorandum specifically advised class members that they could telephone designated members of plaintiff's counsel's law firm for any assistance in connection with the interrogatories.

On February 20, 1967, plaintiff's counsel sent a letter to each class member who had not responded to the interrogatories and the order for production of documents. This

letter, a copy of which is before the court, reminded these class members that their answers and documents must be received by March 1, 1967 and that they could contact plaintiff's counsel if they had any questions.

On April 17, 1967, a second pre-trial conference was held. Paragraph 2 of the Second Pre-trial Conference Order, entered May 2, 1967, directed plaintiff's counsel to furnish the court with a list of all persons who had not responded by June 1, 1967. This order further provided that the court would thereafter consider entering an order which would dismiss with prejudice those nonresponding class members unless their answers and documents were received by plaintiff's counsel within 20 days after the entry of such an order.

On May 4, 1967, an additional memorandum was sent by plaintiff's counsel to all class members who had not sent answers to interrogatories and documents subject to production. This memorandum, a copy of which is before the court, reminded the nonresponding class members that if their claims were dismissed with prejudice for failure to respond, they could not share in any recovery. The memorandum explicitly described the portions of the Second Pre-trial Conference Order concerning dismissal of nonresponding class members.

On June 7, 1967, the court ordered those members who had not answered defendant's interrogatories to show cause on or before July 14, 1967 why their actions and claims should not be dismissed with prejudice for failure to respond to defendant's interrogatories.

On June 9, 1967, plaintiff's counsel prepared an explanatory memorandum to accompany the mailing of the court's show cause order of June 7, 1967. This letter, a copy of which is before the court, explained the effect of not answering the interrogatories by July 14, 1967. The mailing of this explanatory memorandum and the court's show cause order to all nonresponding class members, *including movants* here, was completed by June 12, 1967, as evidenced by an affidavit of mailing filed on June 14, 1967.

On August 9, 1967, defendant filed a motion to dismiss with prejudice those members of plaintiff's class who had

failed to answer its interrogatories. Exhibit "A" attached to that motion, containing five pages, set forth the names and addresses of the persons who had failed to answer the interrogatories. That listing is attached hereto as Appendix A.

On August 17, 1967, this court entered an order dismissing with prejudice the actions and claims of all persons listed on Exhibit A attached to defendant's motion.

On August 23, 1967, copies of that order of dismissal were mailed by plaintiff's counsel to all persons who were dismissed, as evidenced by an affidavit of mailing filed with this court on August 30, 1967. Movants did not file their present motion until March 11, 1970, over two and a half years after the dismissal.

II. Movants Not Entitled to Relief Under Rule 60(b)

A. *Relief under Rule 60(b) is not a substitute for appeal and is granted within the discretion of the court.*

At no time has any movant filed with the clerk of this court a notice of appeal from the order of dismissal. Pursuant to Rule 4, Fed. R. App. Proc., movants lost their right to appeal from the order of dismissal thirty days after its entry. It is clear that this motion for relief under Rule 60(b) is not a substitute for the appeal which was not taken. *See Ackermann v. United States*, 340 U.S. 193 (1950). *See generally* 7 MOORE, FEDERAL PRACTICE § 60.18 [18] (1954) (hereinafter cited as MOORE).

In order to obtain relief under Rule 60(b), the petitioner must show both that the grounds for such relief falls within one or more of the six reasons specified within Rule 60(b) (1) to (6) *and* that these circumstances justify relief from the operation of the order. *See Klapprott* v. *United States*, 335 U.S. 601 (1949); *Ackermann* v. *United States, supra; Flett* v. *W. A. Alexander & Co.*, 302 F.2d 321 (7th Cir. 1962), *cert. denied*, 371 U.S. 841; *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818 (2d Cir. 1967). In this case, the movants may *not* rely upon the grounds for relief specified in Clauses 1-3 of Rule 60(b) because a motion for relief based upon any of these reasons was required to have been made within

one year of the order of dismissal. Consequently, as grounds for relief, movants must show either that the order of dismissal was "void" within the meaning of Rule 60(b)(4) or that the circumstances of their case present those "exceptional circumstances" not within the scope of the other reasons enumerated in Rule 60(b) (1) to (3), which circumstances constitute one of the unforeseen contingencies properly within the residual clause, Rule 60(b) (6). *See Klapprott* v. *United States, supra; Ackermann* v. *United States, supra; Flett* v. *W. A. Alexander & Co., supra. See generally* MOORE §§ 60.18[8] and 60.27.

Where the district court is presented with a reason permitting relief under Rule 60(b), then its determination to grant or deny relief involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted. *See Flett* v. *W. A. Alexander & Co., supra* at 324. *Rinieri* v. *News Syndicate Co., supra* at 822. Professor Moore has summarized some of the factors which the district court may consider in exercising its discretion on whether to grant relief under Rule 60(b) as follows:

> "the general desirability that a final judgment should not be lightly disturbed; the procedures provided by Rule 60(b) is not a substitute for an appeal; the Rule should be liberally construed for the purpose of doing substantial justice; whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; if relief is sought from a . . . judgment of dismissal where there has been no consideration of the merits, whether in the particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgments . . . ; and any other factor that is relevant to the justice of the judgment under attack, bearing in mind that the principle of finality of judgments serves a most useful purpose for society, the courts, and the litigants—in a word, for all concerned." MOORE § 60.19, at 225-26 (footnotes eliminated).

The named movants brief states that the issue before this court is:

> "[W]hether or not the defendant insurance company will be allowed .... to subvert the purpose of Rule 23(b)(3) by eliminating members of the class in the preliminary stages of the case by the improper use of discovery procedures and thus ... to deprive the claimants of their day in court and opportunity to present meritorious claims against the wrongdoer?" Br. p. 5.

This is not, however, the issue before this court. The issue presented by this motion is: Whether the circumstances surrounding the dismissal of the movants present grounds for relief under Rule 60(b)(4) or (6) and, if they do, whether setting aside the dismissal is an appropriate remedy to accomplish justice. *See Klapprott* v. *United States, supra* at 614-15.

B. *No grounds for relief under Rule 60(b)(4) since dismissal is neither void nor denial of procedural due process*

Named movants argue in their brief that Rule 33 permits interrogatories to be served only upon named parties and not upon members of a class. Because the use of Rule 33 by defendant was "improper," movants conclude that therefore "the order of dismissal for failure to comply is void" and that "to allow the defendants [sic] to eliminate members of the class in this matter [manner] violates the concepts of fair play and procedural due process." Br. 9-10.

Even assuming *arguendo* that defendant could not, under Rule 33, serve interrogatories upon members of plaintiff's class, nevertheless the order of dismissal for failure to answer these interrogatories was neither "void" nor did it violate movants' constitutional right to due process. Whether a judgment or dismissal is "void" is not determined by ascertaining whether it was substantively correct or valid. *See* MOORE § 60.25[2]. Rather, whether a judgment or dismissal is void is determined by ascertaining whether the court possessed subject matter jurisdiction

and personal jurisdiction over the objecting party. *See id.* Therefore, if this court has subject matter jurisdiction and personal jurisdiction in this action, its dismissal was not void—even if (as is *not* true) the dismissal was substantively incorrect.

It is indisputable that this court has subject matter jurisdiction over this action which alleged a violation of the Securities Exchange Act of 1934. *See* 15 U.S.C.A. § 77v and 28 U.S.C.A. § 1331. Movants do not contend, nor could they contend, that this court lacked personal jurisdiction over them in this action. Accordingly, movants' contention that their dismissal was void is wholly without merit.

In addition to contending that this order of dismissal was "void," movants argue that the dismissal deprives them of procedural due process. It is true that *if* a court's proceedings were conducted in so arbitrary or improper a manner that its actions constituted a denial of due process, then a judgment or dismissal rendered pursuant to such a procedure would also be "void" within the meaning of Rule 60(b)(4). *See* MOORE § 60.25[2] at 270-71. *Cf. Pittston* v. *Reeves,* 263 F.2d 328 (7th Cir. 1959).

What the Constitution requires by way of procedural due process in class actions can be determined from two Supreme Court decisions, *Hansberry* v. *Lee,* 311 U.S. 32, 41-44 (1940), and *Mullane* v. *Central Hanover Bk. & Trust Co.,* 339 U.S. 306 (1950). In *Hansberry,* the Court stated the general principle that:

> "there has been a failure of due process only in those [class actions] where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry* v. *Lee,* supra at 42.

In *Mullane,* the Court further specified what type of notice to absent members of a class was required in order to comply with the requirements of due process.

> "[I]n any proceeding which is to be accorded finality . . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an oppor-

> tunity to present their objections [is required by due process]." *Mullane* v. *Central Hanover Bk. & Trust Co., supra* at 314.

Where, as in this case, the names and addresses of persons whose interests were to be affected by the adjudication are known, the Court held that due process requires notice to be mailed to them. *Id.* at 318-20.

Movants herein were in no way deprived of procedural due process. As described in detail above, copies of this court's notice of pendency of class action (Oct. 12, 1966), orders to produce (Dec. 22, 1966) and to answer defendant's interrogatories (Jan. 4, 1967), order to show cause (June 7, 1967), and order of dismissal with prejudice (Aug. 17, 1967) were mailed to all movants. Moreover, plaintiff's counsel mailed movants a memorandum explaining the orders to produce and to answer the interrogatories (Jan. 12, 1967), a letter reminding them of the March 1, 1967, deadline for answers (Feb. 20, 1967), a further letter exhorting answers and warning of the possibility of dismissal (May 4, 1967), and a letter explaining the significance of the show cause order (June 9, 1967).

It should be noted that movants do not contend that these procedures in any way failed to comply with the notice requirements of Rule 23(c) and (e).

C. *Exceptional circumstances required as grounds for relief under Rule 60(b)(6) not present*

Movants' remaining two arguments for relief—that dismissal was based upon improperly propounded interrogatories and that the use of the dismissal was inequitable—do not rely upon any of the grounds specified within Clauses (1) to (5) of Rule 60(b). Evidently, movants rely upon the residuary clause (6) of Rule 60(b).

As noted above, in order to come within Rule 60(b)(6), the movants must establish that the circumstances of their dismissal present "exceptional circumstances." *See Klapprott* v. *United States, supra; Ackermannn* v. *United States, supra; Flett* v. *W. A. Alexander & Co., supra.* As Professor Moore's correctly states:

"Like Rule 60(b) generally, clause (6) should be liberally applied to situations not covered by the preceding five clauses so that, giving due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has the power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice.

"It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon *some reason other than those stated in clauses (1)-(5);* and second, the other reason urged for relief must be such as to *justify* relief.

* * *

"Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6): even though relief from a judgment might have been obtained had an appeal been taken. . . ." MOORE § 60.27[1] at pp. 295, 297-98 (emphasis in original).

Movants contend that the *only* affirmative action which Rule 23 requires members of a Rule 23(b)(3) class to take is sending notice to the court if they wish to be excluded from the class. Accordingly, they argue that it was "improper" for this court to require that class members answer interrogatories and produce documents during the pretrial stages of this litigation. Movants admit, however, that there is no judicial support for their arguments. Rather, there are four district court cases which contemplate and approve requiring affirmative action by class members at the pre-trial stages of litigation.

In a class action for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, a district court, relying upon Rule 23(d) and its inherent general powers, ordered all members of the class to file statements which included facts similar to the interrogatories served upon the movants herein. *Harris* v. *Jones,* 41 F.R.D. 70, 74-75

(D.Utah 1966). The *Harris* court ordered class members to file statements describing:

> "the types and sources of representations, if any, upon which they relied in purchasing their securities and the time they first learned any representations were false. An order will be made, and notice given, that if such statements without good cause are not filed within the time specified the action may be *dismissed with prejudice* as to defaulting members. . . ." *Id.* (emphasis added, footnote omitted.)

In a class action antitrust suit, another district court specifically authorized the defendants to pose "interrogatories to plaintiff and all members of the class" concerning the transactions between the plaintiff's class (purchasers) and the defendants (manufacturers). *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 582 (D.Minn 1968).

At least four district courts have ordered that class members during the early pre-trial stages of litigation must submit intentions of filing claims or proof of claims or be barred from recovery. *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391, 403-404 (S.D.Iowa 1968) (citing *Harris* v. *Jones, supra*, with approval); *Philadelphia Elec. Co.* v. *Anaconda Amer. Brass Co.*, 43 F.R.D. 452, 459, 462 (E.D.Pa. 1968); *Minnesota* v. *United States Steel Corp., supra* at 577-78; *Harris* v. *Jones, supra.*

Contrary to movants' assertion, there is nothing in the record or before this court to suggest that defendants had a "scheme" to make "improper use of discovery procedures" and thereby "deprive claimants [movants] of their day in court." As noted above, the interrogatories and documents sought to be produced were highly relevant to *both* plaintiff's and defendant's cases. Lead counsel for plaintiff, an experienced and highly competent lawyer, believed that defendant was entitled to obtain information concerning the contacts between class members and Dobich and was himself desirous of obtaining such information. In fact, as lead counsel states: "Our [plaintiff's] case was benefited immeasurably from information obtained through these [defendant's] discovery efforts." Movants' further asser-

tion that the information sought to be elicited by defendant's discovery was "either known at the time or was not material" is patently incorrect.

Accordingly, movants have failed to demonstrate any of the "extraordinary circumstances" which would be grounds for relief under Rule 60(b)(6).

D. *Justice in no way warrants relief under Rule 60 (b)(6).*

As an alternative basis for denying movants relief under Rule 60(b)(6), even assuming *arguendo* that movants had demonstrated (which is *not* the case) the exceptional circumstances and unforeseen contingencies which empower a court to grant relief under Rule 60(b)(6), the movants have totally failed to show that permitting them to now share in the recovery of the class would be in furtherance of justice. In other words, under the circumstances of this case it is not inequitable to deny movants relief.

The named movants assert in their unverified brief that none of them "had any knowledge of the legal implications of these matters" until October 1969 when the news media carried a story about the Court of Appeals for the Seventh Circuit affirming this court's finding in favor of plaintiff's class. It is difficult for this court to conceive how movants could remain "without any knowledge of the legal implications" of their failure to answer defendant's interrogatories when *movants were mailed nine (9) written communications concerning these interrogatories, their obligation to answer them, and the consequences of failing to answer them.* Approximately 80% of the initial class did respond and apparently understood the "legal implications."

The form, extent and content of the notices mailed to the movants with respect to the interrogatories far exceeds any and all requirements of procedural due process. Movants have waited over two and one-half years to object to their dismissal. They did not object to the interrogatories at the time they were served nor at the time of the show cause order. They did not appeal their dismissal. In fact

they did nothing until it was evident to them that plaintiff had been victorious. At this point they seek to be readmitted as members of the now-victorious class. Granting relief under these circumstances would not be unlike reviving the old evil of "one way" intervention in class actions, which the 1966 amendments to Rule 23 were intended to eliminate, in a different form. *See* Notes of Advisory Comm., 28 U.S.C.A., Rules of Civil Pro., Rule 23; p. 82.

The striking dissimilarity between the facts and circumstances of this case and those in *Klapprott* which, if they were true, the Supreme Court held entitled Klapprott to relief from a default judgment of denaturalization under Rule 60(b)(6) is evident from the following language from *Klapprott:*

> "[Klapprott's petition's] allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence, *indifference,* or *careless disregard of consequences.* For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings. Without funds to hire a lawyer, petitioner was defended by appointed counsel in the criminal cases. Thus petitioner's prayer to set aside the default judgment did not rest on mere allegations of 'excusable neglect.' . . . [H]e was *deprived of any reasonable opportunity to make a defense* to the criminal charges instigated by officers of the very United States agency which supplied the secondhand information upon which his citizenship was taken away from him in his absence. The basis of his petition was not that he had neglected *to act in his own defense,* but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully

occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the New Jersey court than he would have been had he never recived notice of the charges." *Klapprott* v. *United States, supra* at 613-14 (emphasis added).

Even *assuming* that the movants herein ever had any basis upon which to object to their dismissal, denial of relief to them under Rule 60(b)(6) at this time and under these circumstances in no way constitutes an injustice nor violates any concept of due process.

ORDER

For the reasons discussed above, the motion for relief from this court's order of dismissal of August 17, 1967 made upon behalf of the named movants and upon behalf of all other persons similarly situated whose names appear in Appendix A attached hereto for relief under Rule 60(b), FED. R. CIV. P., is denied in its entirety.

Entered this 17th day of June, 1970.

JESSE E. ESCHBACH
United States District Judge